

**MILITARY COMMISSIONS, TRIAL JUDICIARY
GUANTANAMO BAY, CUBA**

UNITED STATES OF AMERICA

v.

NOOR UTHMAN MUHAMMED

D-_____

Motion to Retain Military Counsel

(17March 2010)

1. **Timeliness:** This Motion is filed outside the timeline established by the Commission's Order requiring Defense motions to be filed by 10 March 2010. The Defense respectfully requests leave to file and to have the Commission consider this Motion before the 24 March 2010 hearing. The issue presented was not ripe prior to the deadline and its prompt resolution is critical to this case.

2. **Relief Requested:** On behalf of Noor, the Defense respectfully requests that the Commission permit Major Fitzgibbons to continue her representation of Noor, despite her assignment to United States Army Trial Defense Service. The Defense requests that the Commission find that Major Fitzgibbons has an ongoing attorney-client relationship with Noor. In light of that relationship and the Army's refusal to provide Major Fitzgibbons, the Defense requests the Commission order her production for the 24 March hearing and abate the proceedings until she is produced.

3. **Overview:** Major Fitzgibbons was detailed military counsel from June 2008 until November 2009 and thereafter has continued representation as civilian counsel. In March 2010 she received mobilization orders from the Army. Her ongoing attorney-client relationship with Noor has not been severed. There is no good cause for severance and, although no proof of prejudice is required, Noor would be significantly prejudiced if counsel is removed from the case.

4. **Facts:**

a. On 25 June 2008, Colonel Steven David, former Chief Defense Counsel, Office of Military Commissions, detailed Major Amy Fitzgibbons to represent Noor Uthman Muhammed. At the time of her appointment, Major Fitzgibbons was the sole military counsel on the case.

b. Colonel David notified Major Fitzgibbons that two civilian attorneys, Howard Cabot and Jim Nickovich, volunteered to represent Noor in a habeas corpus action in federal court *pro bono*. Major Fitzgibbons contacted these attorneys and they agreed to assist her in representing Noor before military commission.

c. Major Fitzgibbons is a United States Army Reserve Judge Advocate. The Army initially mobilized her to the Office of the Chief Defense Counsel for 365 days. Those orders expired on 3 May 2009. Major Fitzgibbons agreed to extend in the Office for an additional 6 months. The second set of orders expired on 4 November 2009. Major Fitzgibbons' husband is a Judge Advocate on active duty and stationed at Fort Lewis, Washington. Major Fitzgibbons relocated to Fort Lewis in November 2009.

d. Prior to her move and release from active duty, the Regional Defense Counsel at Fort Lewis and the Chief, U.S. Army Trial Defense Service (TDS) contacted her regarding a follow on mobilization to TDS at Fort Lewis. Trial Defense Service anticipated that it would be required to support two capital cases in addition to their typical workload. Major Fitzgibbons explained that she was involved in Noor's case and did not believe that he would release her from continued participation. Colonel Peter Masciola, Chief Defense Counsel, supported Major Fitzgibbons' continued involvement in the case and requested that the Deputy Chief Defense Counsel speak with the Chief, U.S. Army TDS to discuss that possibility. The Chief of TDS indicated that he would not permit Major Fitzgibbons to continue representing Noor, if mobilized. Major Fitzgibbons also personally addressed the Chief of TDS. In his opinion, her status on Noor's case should not preclude her mobilization. The Chief of TDS advised her that the Defense team should act in Noor's best interests and TDS could deal with the issue if it arose.

e. Between November 2009 and March 2010, Major Fitzgibbons received conflicting information from TDS regarding the approval of her orders. In early January, TDS informed her that the request for her orders was denied based on funding considerations. Trial Defense Service resubmitted the request for orders. In February 2010, Major Fitzgibbons again contacted TDS prior to a civilian job interview. Major Fitzgibbons was told that the orders were not likely to be approved, again due to funding considerations. On 24 February 2010, Major Fitzgibbons received an automated e-mail indicating that the orders were moving forward. During the week of 7 March 2010, Major Fitzgibbons contacted both TDS and the Judge Advocate General Personnel Branch to determine the start date of the orders. The Personnel branch instructed her to report to Fort Lewis on 15 March 2010, even if she had not received orders. The Personnel Branch indicated that the orders should be processed within the week with a start date of 15 March 2010.

f. In November 2009, Major Fitzgibbons applied, and was subsequently accepted, for admission to the pool of counsel qualified to appear before military commission. Major Fitzgibbons notified this Commission that her orders had expired and her status on the case had changed.

g. In her status as civilian counsel from November 2009 to March 2010, Major Fitzgibbons continued to represent Noor acting as lead counsel. During this time she

participated in all 802 hearings and continued to review discovery, file motions and take other necessary steps to prepare the case for trial.

h. On 16 March 2009, Major Fitzgibbons received orders for a year mobilization to US Army Trial Defense Services with duty at Fort Lewis, Washington. On 16 March 2009, the Acting Chief¹, U.S. Army Trial Defense Service notified Major Fitzgibbons through the Regional Defense Counsel that she should not take any steps to travel from Fort Lewis absent an order from the military judge or convening authority.

5. Law and Argument

The right of indigent defendants to court-appointed counsel is firmly rooted in the 6th Amendment of the United States Constitution. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Gideon v. Wainwright*, 372 U.S. 335 (1963). Servicemembers have long been afforded more expansive rights to counsel including appointment regardless of indigence and the ability to request particular military counsel. *See*, 10 U.S.C. § 827 and § 838. The Military Commissions Act extends the right to counsel to detainees facing trial before military commission. 10 U.S.C. § 948k. Under the Military Commissions Act, detainees are entitled to detailed counsel, civilian counsel at their own expense and to individual military counsel, if reasonably available. 10 U.S.C. § § 948k, 949a(b)(2)(C)(i).

No appellate court has considered the statutory right to counsel provided in the Military Commissions Act. The case law governing the right to counsel before military courts-martial provides persuasive authority regarding the proper framework for resolving this issue.

The military appellate courts have zealously guarded the relationship between military counsel and their servicemember clients. *See United States v. Hansom*, 24 MJ 377 (CMA 1987); *United States v. Baca*, 27 MJ 110, 119 (1998) (noting that “[d]efense counsel are not fungible items”). The Court of Appeals for the Armed Forces summarized the high hurdle that must be overcome when the Government seeks to sever an attorney-client relationship:

A servicemember may not be deprived of the services of his detailed military defense counsel or his appointed IMC simply because of a routine change in the military attorney’s assignment or duty station. . . . If there is an existing attorney client relationship between a servicemember and a military attorney concerning the substance of the charges at issue, it may be severed for only ‘good cause’. . . . In the context of an attorney-client relationship, the ‘good cause’ requirement places a heavy burden on the Government to justify any action that would sever the relationship.

United States v. Spriggs, 52 M.J. 235, 239-240 (2000) (citations omitted).

¹ The Chief of U.S. Army Trial Defense Service was unable to be immediately reached while TDY in Korea.

Both law and service regulations distinguish between situations involving on-going attorney-client relationships and those involving a prospective relationship based on the military's limited right to counsel of choice. The current case falls squarely within the first category. In *Spriggs*, the CAAF established a two-step analysis requiring the Defense to demonstrate the existence of an on-going attorney client relationship at which point the burden shifts to the Government to demonstrate good cause for the severance of the attorney-client relationship.

Here, counsel has maintained a well-established, long-standing relationship with Noor arising out of the current charges. The test articulated in *Spriggs* is whether there is a "bilateral understanding as to the nature of future representation and active engagement by the attorney in the preparation and pretrial strategy of the case." *Id.* at 241. Major Fitzgibbons was detailed to represent Noor in June 2008. Although charges were re-sworn, Major Fitzgibbons continuously represented Noor from June 2008 through his arraignment on the current charges in January 2009. The break in Major Fitzgibbons' active service did not sever the attorney-client relationship in this case. Trial Defense Service was aware of the relationship at the time it requested her orders. Further, Major Fitzgibbons served as Noor's counsel in a civilian capacity during the break in service. Both Noor and counsel were in agreement that Major Fitzgibbons' representation should continue. Major Fitzgibbons was the lead and sole military counsel on the case from June 2008 through the arraignment in January 2010. At the arraignment, Noor elected to be represented by both Major Fitzgibbons and civilian pro bono counsel; however he declined to identify a lead counsel. Based on Major Fitzgibbons' full-time commitment to the case, she became the *de facto* lead counsel. In this role, she actively prepared Noor's case for trial by conducting pretrial investigation, reviewing the discovery, interviewing experts and filing motions in the case.

On this record, the Commission must find that a viable, on-going attorney-client relationship exists. The burden rests with the Government to demonstrate good cause for declining to make Major Fitzgibbons available; essentially severing the attorney-client relationship. The Commission should reject reliance on financial or logistics considerations in determining whether good cause exists. *See United States v. Eason*, 21 USCMA 335 (1972) (holding that it is the duty of the Government to shoulder the financial, logistical or administrative burden of continued representation). Major Fitzgibbons is serving on active duty in a defense capacity. The Government made the initial decision to mobilize Major Fitzgibbons and, in this role, she was detailed and served as Noor counsel. In this instance, the Government has elected to continue Major Fitzgibbons service on active duty. There is no justifiable reason for permitting the severance of the attorney-client relationship on these facts.

The Court of Appeals for the Armed Forces has recognized that Governmental interference affecting the attorney-client relationship will be tested for structural error on appeal consistent with the Supreme Court's decision in *United States v. Gonzalez-Lopez*, 548 U.S. 140 (2006). *United States v. Wiechman*, 67 M.J. 456, 463 (2009). Although under a structural error

analysis, no proof of prejudice is required, Noor would be significantly prejudiced if counsel is removed from the case. After eight years, Noor's case is moving towards trial. Counsel has spent significant time not only working with Noor but also researching the factual and legal issues involved in this particularly complex case. Counsel has overcome significant barriers to the establishing a functioning attorney-client relationship with Noor; a relationship that was initially imposed upon Noor as a result of his status as a Commission's defendant. Based on these particular facts, significant prejudiced would adhere to Noor if he is denied the continued assistance of Major Fitzgibbons.

7. **Request for Oral Argument:** The Defense requests this motion be granted prior to the next scheduled RMC 803 session on 24 March 2010.

8. **Request for Witnesses and Evidence:** None

9. **Conference with Opposing Counsel:** In the last RMC 802 session as well as in previous communications with the Defense, the Prosecution's has declined to take a position regarding Noor's entitlement to Major Fitzgibbons' continued participation.

10. **Additional Information:** None.

11. **Attachments:**

A. Declaration of Major Amy Fitzgibbons dated 18 March 2010 (filed ex parte).

Respectfully submitted,

BY: //s//

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